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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1467

THE AMERICAN BASKETBALL ASSOCIATION,

Petitioner,

—against—

AMF VOIT, INC. and AMF, INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1973

No. .....

The American Basketball Association,

Petitioner,

—against—

AMF Voit, Inc. and AMF, Incorporated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, American Basketball Association (hereinafter "ABA"), requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 4, 1974.

Opinions Below

On December 18, 1973, the United States Court of Appeals for the Second Circuit affirmed without opinion the judgment of the United States District Court for the Southern District of New York in favor of the Respondents AMF Voit, Inc. and AMF, Incorporated, the parent corporation (hereinafter referred to jointly as "AMF"). The Court of Appeals affirmance which has not yet been

officially reported is reprinted as Appendix A hereto. The opinion of the District Court is reported at 358 F. Supp. 981 (S.D.N.Y. 1973) and is reprinted as Appendix B hereto.

Jurisdiction

A petition for rehearing was timely filed by the ABA on December 28, 1973. The Order of the Court of Appeals for the Second Circuit denying rehearing was entered on January 4, 1974 and is reprinted as Appendix C hereto. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review the judgment below by writ of certiorari.

Questions Presented

1. Was the proper standard for determining inherent distinctiveness of a trademark or service mark under Section 2 of the Lanham Act and under the common law applied by the lower courts in holding that the mark of the ABA is invalid?

2. Was the proper standard for determining whether a trademark or service mark has acquired secondary meaning under Section 2(f) of the Lanham Act and under the common law applied by the lower courts in holding that the mark of the ABA is invalid?

3. Did AMF satisfy its burden of proving that the ABA had abandoned its trademark and service mark in failing to exercise adequate quality control over goods sold by licensees of the ABA?

4. Does the sale of basketballs bearing the ABA mark and the word "Official" and/or the use of designations such

as "ABA Type" in connection with the advertising, promotion and sale of such basketballs by AMF constitute unfair competition?

Statute Involved

The statutory provisions involved are the following portions of Section 2 of the Trademark Act of 1946 (Lanham Act), 15 U.S.C. §1052:

> "No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature . . .
>
> . . .
>
> (f) Except as expressly excluded in paragraphs (a)-(d) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce."

The complete text of Section 2 of the Lanham Act, 15 U.S.C. §1052, is reprinted in Appendix D hereto.

Statement of the Case

The ABA, a professional basketball league, instituted an action for damages and injunctive relief against AMF on common law and Lanham Act grounds alleging trademark and service mark infringement and unfair competition. Federal jurisdiction in the District Court was based upon Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a). and the doctrine of pendent jurisdiction. After a trial on the merits pursuant to Rule 65 of the Federal Rules of Civil Procedure, the District Court granted judgment for AMF and dismissed the ABA complaint. The Court of Appeals affirmed the decision without opinion.

At the time of its organization in 1967, the ABA designed, adopted and commenced use of a color pattern consisting of red, white and blue panels arranged in a specific spherical configuration. Since then, this color pattern has been continuously used by the ABA as its trademark and service mark (hereinafter sometimes referred to as the "mark"). This singular color pattern was selected from a wide range of colors and from a vast number of permutations and combinations of the arrangement of the colors red, white and blue upon a basketball to specifically identify the ABA and to distinguish the ABA from other service and sales organizations such as the National Basketball Association and sellers of promotional merchandise. The mark was primarily utilized by applying it to the surface of basketballs although other ABA merchandise and ABA stationery also bear the mark. When adopted in 1967, the mark constituted a radical departure from anything which was in general use at the time in the area of sporting goods or related activities. Of particular uniqueness was the application of the mark to basketballs because prior to such use by the ABA, multi-colored patterns on any type of athletic ball was virtually unknown. As the District Court found (Appendix B, p. A-3), basketballs had traditionally been brown or tan. Accordingly, the mark constituted a distinctive and very specific application of a color design upon a basketball.

Only basketballs bearing the mark have been used by the ABA in public exhibitions and in games by and between ABA teams. These ABA games and the mark have been seen by thousands of spectators and viewed by millions of persons on local, regional and national television. In addition, since 1967, the ABA and the mark have been the sub-

ject of continuous and widespread publicity in newspapers and in magazines such as *Sports Illustrated,* wherein, as the District Court found (Appendix B, p. A-3), the red, white and blue basketball was prominently displayed. Accordingly, a strong public identification between the mark and the ABA has been generated. As a result, mere display of the mark on or in connection with a product or service has come to connote or indicate a relationship to the ABA.

Three years after the ABA first adopted the mark, AMF, which had long been a leading manufacturer of basketballs and other sporting goods, commenced use of the ABA mark. In addition to AMF, virtually every leading manufacturer of basketballs commenced production and sale of basketballs bearing the mark. These attempts to trade upon the recognition and good will which the ABA had developed in the mark were perpetrated with simultaneous widespread advertising, by AMF and others, of basketballs as "ABA type", "ABA style", and even as "ABA basketballs". In many cases, these basketballs are brazenly promoted as "Official". (Appendix B, p. A-7).

REASONS FOR GRANTING THE WRIT

I

Inherent Distinctiveness Which Is a Fundamental Requirement for Trademark Validity Remains Undefined in the Law and It Is Essential That This Court Establish Guidelines.

The preamble to Section 2 of the Lanham Act recites the fundamental principle that "no trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration . . ." This language codifies the long-standing common law requirement that a symbol must be inherently distinctive in order to qualify for trademark protection. Despite the fundamental nature of this requirement, there is no comprehensive statement in the law which defines the requirement or which offers a predictable basis for its determination. Under existing case law, it is impossible to ascertain with any degree of certainty the elements, characteristics or circumstances of a particular mark which give rise to inherent distinctiveness. Despite the existence of numerous cases which have decided whether specific marks were or were not inherently distinctive, none has expressly set forth rational criteria for ascertaining the nature of the inherent distinctiveness requirement. See *A. Leschen & Sons Rope Company* v. *Broderick & Bascom Rope Company*, 201 U.S. 166 (1906); *The Barbasol Co.* v. *Jacobs*, 160 F. 2d 336 (7th Cir. 1947); *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 119 F. 2d 316 (6th Cir. 1941), rev'd on other grounds, 316 U.S. 203 (1942); *Hygienic Products Co.* v. *Coe*, 85 F. 2d 264 (D.C. Cir. 1936); *In re McElhenny Co.*, 278 F. 2d 953

(CCPA 1960); *In re Burgess Battery Co.*, 112 F. 2d 820 (CCPA 1940); *In re Swift & Co.*, 223 F. 2d 950 (CCPA 1955); *In re General Tire and Rubber Co.*, 404 F. 2d 1396 (CCPA 1969); *James Heddon's Sons* v. *Millsite Steel & Wire Works*, 128 F. 2d 6 (6th Cir. 1942); *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. 2d 4 (7th Cir. 1950); *In re Todd Co., Inc.*, 290 F. 2d 597 (CCPA 1961); *Campbell Soup Co.* v. *Armour & Co.*, 175 F. 2d 795 (3d Cir. 1949).

The Courts in the aforecited cases, as well as the lower courts at bar, have merely relied solely upon unreasoned visual or subjective reactions without articulating any rationale as to why the mark was or was not inherently distinctive. Only in *In re McElhenny Co., supra,* and *In re General Tire and Rubber Co., supra,* was some attempt made to provide such a rationale, but these cases, at best, merely indicate a few specific negative factors rendering the respective marks *not* distinctive. They do not provide, in a positive sense, guidelines for determining when a mark *is* distinctive.

Section 2 of the Lanham Act is the cornerstone upon which the trademark law of the United States is founded. The absence of definitive guidelines with respect to so fundamental a requirement as inherent distinctiveness leaves the courts, businesses, the Patent Office and the trademark bar to flounder in a sea of uncertainty in the selection and evaluation of trade indicia. Because no rational criteria exist, substantial and otherwise unnecessary amounts of time and money are expended in the development of marks ultimately held invalid.

The sharp inconsistencies which this void has created can, perhaps, be best highlighted by comparing the decision below with the practice currently followed by the U.S.

Patent Office. The Patent Office published the ABA trademark (Official Gazette of February 22, 1972) and ruled that the mark is distinctive within the meaning of Section 2 of the Lanham Act. Furthermore, a study of the Patent Office records reveals that hundreds of color design trademarks similar to the ABA mark are consistently published and registered every year.

Moreover, the decision below is in sharp conflict with those of other circuits where a different rule of law is applied. Clearly, a mark such as that at bar would be considered distinctive in the Court of Customs and Patent Appeals (See *In re Esso Standard Oil Co.*, 305 F.2d 495 (CCPA 1962); *In re Todd Co., Inc.*, 290 F.2d 597 (CCPA 1961); *In re Hehr Mfg. Co.*, 279 F.2d 526 (CCPA 1960); *In re Swift & Co.*, 223 F.2d 950 (CCPA 1955), in the Seventh Circuit (See *The Barbasol Co.* v. *Jacobs*, 160 F.2d 336 (7th Cir. 1947)) and in the Court of Appeals for the District of Columbia (See *Hygienic Products Co.* v. *Coe*, 85 F.2d 264 (D.C. Cir. 1936)).

The questions presented by the case at bar are of great significance since they affect, in a fundamental way, the entire body of trademark law. There are compelling reasons why definitive guidelines in the application and interpretation of Section 2 of the Lanham Act must now be marked by this Court.

The ABA has exerted great effort to develop public recognition of its trademark. Television coverage and other media exposure have been assiduously promoted. So diligent have been the ABA's efforts that the color pattern of the instant trademark is today one of the most widely recognized symbols in the country, ranking in importance and familiarity with some of the most valuable trademarks in existence. Indeed, it is among the most valuable and

important assets of the ABA. Certainly, the importance of the mark is underscored by the fact that virtually every manufacturer of basketballs today makes basketballs bearing the ABA mark and approximately one half of all basketballs sold in the United States display the mark. Indeed, AMF's annual profit from the sale of basketballs bearing the mark is about $200,000. Thus, the outcome of the instant litigation will unquestionably have a substantial affect upon the entire sporting goods industry and upon professional basketball.

Clearly, a mark of such enormous value and importance should not be declared invalid without some rational basis for such a conclusion, which the lower courts failed to provide. Accordingly, the issues presented involve questions of far-reaching public significance relating to the interpretation of the Lanham Act and therefore, the writ should be granted.

II

Certiorari Should Be Granted Because the Decisions of the Lower Courts Conflict With Prior Decisions of This Court.

In *A. Leschen & Sons Rope Company* v. *Broderick & Bascom Rope Company,* 201 U.S. 166, 171 (1906) this Court held that color may constitute a valid trademark, provided it is impressed in a particular design, such "as a circle, square, triangle, a cross, or a star".

Mishawaka Rubber & Woolen Mfg. Co. v. *Kresge Co.,* 316 U.S. 203 (1942), involved a trademark consisting of a red circular plug imbedded in the center of the rubber heel of a shoe. Commenting upon the *Mishawaka* case, the Seventh Circuit Court of Appeals stated:

> "While the question as to the validity of the trademark was not considered by the Supreme Court, the fact that it took the case and announced a rule for the measurement of damages would seem to be some indication that the court considered the trademark as valid." *The Barbasol Co.* v. *Jacobs,* 160 F. 2d 336, 338 (7th Cir. 1947).

The instant trademark constitutes color impressed in a particular pattern or design. While the design is not identical with those specifically enumerated by this Court in the *Leschen Rope* case, it clearly constitutes color impressed in a particular design and therefore falls within the *Leschen Rope* criteria. There is no basis for distinguishing the present case from *Leschen Rope,* and incredibly, neither the opinion in *Leschen Rope* nor in *Mishawaka* are even mentioned in the District Court's opinion. These opinions have not only been contravened, they have been ignored.

Thus, the writ should be granted in order to compel the Second Circuit Court of Appeals to follow this Court's decisions in *Leschen Rope* and *Mishawaka.*

III

This Court Should Clarify the Confused and Contradictory State of the Law Relating to the Requirement That a Claimant Must Qualify as a Source in Order to Obtain Trademark Protection Under the Secondary Meaning Doctrine.

After holding the ABA mark not inherently distinctive, the lower courts further ruled that the mark had not acquired secondary meaning because the ABA did not "hold itself out to be the source of red, white and blue basketballs." (Appendix B, p. A-8). The lower courts made this ruling despite uncontroverted evidence that the ABA had been for many years a direct seller to the public, and in the face of an overwhelming body of evidence showing widespread national recognition of the mark as denoting the ABA. Such blatant error underscores the lack of any comprehensible definition in the law of the requirement that a claimant must qualify as a "source" in the context of the secondary meaning doctrine.

In the opinion below, no explanation is provided for the holding that the ABA is not a source, although *Continental Motors Corp.* v. *Continental Aviation Corp.*, 375 F. 2d 857 (5th Cir. 1967) is cited for the proposition that secondary meaning requires identification of the trademark with the source such that "an ordinary man would immediately associate the goods with their source." (Appendix B, p. A-7). However, this language and the interpretation of *Continental* by the lower courts, requiring that purchasers must

know the specific identity of the source, clearly contradict much existing law. It is self-evident that few purchasers are even remotely aware of the actual source of goods sold under many world-famous trademarks. Few housewives know the manufacturer or source of LUX soap, LIPTON tea or KENT cigarettes.

The confusion regarding the source requirement is heightened when *Continental Motors, supra,* and the opinion of the lower courts are compared with cases such as *Wyatt Earp Enterprises, Inc.* v. *Sackman, Inc.,* 157 F. Supp. 621 (S.D.N.Y. 1958), which held that a mere sponsor or licensor of goods may qualify as a source, or with *Safeway Stores, Inc.* v. *Safeway Properties, Inc.,* 307 F. 2d 495 (2d Cir. 1962), which held that the rights of a trademark owner may be extended into related fields and may be applied to goods never actually made or sold by the owner. See also *Polaroid Corp.* v. *Polaraid, Inc.,* 319 F. 2d 830 (7th Cir. 1963) and *Yale Electric Corp.* v. *Robertson,* 26 F. 2d 972 (2d Cir. 1928).

Furthermore, the courts have applied the source requirement without differentiation when dealing with secondary meaning within the context of the law of unfair competition or palming off as contrasted with the law of trademarks despite the fact that essential differences exist in the elemental principles giving rise to these different causes of action. Under the palming off doctrine of unfair competition, it is required that the goods of one be falsely sold as the goods of another. Thus, the identity of the party falsely represented as the source would, to some extent, need to be known to the purchaser.

Under trademark law, a basically different principle is involved and it is clearly not necessary for trademark infringement that the goods of one be palmed off as the goods of another. Thus, it is important that some distinction be drawn between the source requirement applied under the law of trademarks and that applied under the law of unfair competition or palming off.

In the absence of a definitive statement from this Court regarding the meaning of the source requirement, it will remain impossible to predict with any degree of certainty the directions which various lower courts will take. There already exists a wide diversity of opinion on this very important issue and certiorari should be granted to provide some cohesion to the morass which exists.

CONCLUSION

The area of trademarks and unfair competition has for too long gone undirected by this Court. This has resulted in widely conflicting decisions and in a lack of predictability with regard to the fundamental principles to be applied in this important area of commerce. The Lanham Act is one of our more important federal statutes, yet it remains insufficiently clarified and inadequately interpreted. Meaningful standards for the inherent distinctiveness and secondary meaning requirements of the Lanham Act have not been reflected in the decisions of some of our ablest judges. Thus, it has become imperative for this Court to direct its attention to this area of the law and to resolve the uncertainties which exist. It is earnestly submitted that the case at bar presents an important opportunity for the

establishment of necessary criteria with respect to fundamental aspects of the Lanham Act. Accordingly, it is urged that a writ of certiorari should issue to review the judgment herein of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A
Judgment of the Court of Appeals

72 CIV. 2122
S.D.N.Y.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Eighteenth day of December one thousand nine hundred and seventy-three.

FILED
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U.S. DISTRICT COURT
S.D. OF N.Y.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge

HON. WALTER R. MANSFIELD
HON. WILLIAM HUGHES MULLIGAN,
Circuit Judges,

The American Basketball Association, Plaintiff-Appellant v. AMF Voit, Inc. and AMF Incorporated, Defendant-Appellee	73-1191

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

DOCKETED AS
A JUDGMENT 74/143
JN FEB 4 1974

Irving R. Kaufman
Walter R. Mansfield
William Hughes Mulligan

APPENDIX B

Opinion of the District Court

The AMERICAN BASKETBALL ASSOCIATION, Plaintiff,

v.

AMF VOIT, INC. and AMF Incorporated, Defendants.

No. 72 Civ. 2922.

United States District Court, S. D. New York.

March 5, 1973.

As Amended March 16, 1973.

Action to enjoin alleged infringement of alleged trademark. The District Court, Duffy, J., held that affixation of red, white and blue panels to ordinary basketball was not sufficient to create trademark; and that red, white and blue basketball adopted for use by American Basketball Association was not shown to have acquired trademark status by secondary meaning or subsequent association by public of coloration of ball with league.

Judgment for defendant.

1. Trade Regulation ⇐160

Affixation of red, white and blue panels to ordinary basketball was not sufficient to create trademark.

2. Trade Regulation ⇐168

Red, white and blue basketball adopted for use by American Basketball Association was not shown to have acquired trademark status by secondary meaning or subsequent association by public of coloration of ball with league.

3. Trade Regulation ⇐154

In order for plaintiff's claimed trademark to be entitled to statutory protection, it must in fact be distinctive. Lanham Trade-Mark Act, §§ 2, 45, 15 U.S.C.A. §§ 1052, 1127.

4. Trade Regulation ⇐154

Distinctive designs, whether colored or not, may be protected as trademarks.

5. Trade Regulation ⇐168

Design which lacks sufficient distinction to qualify as valid trademark may nonetheless become good mark if it acquires "secondary meaning."

6. Trade Regulation ⇐478

"Secondary meaning" within trademark laws is equivalent to association between trademark and supposed source of goods such that ordinary man would immediately associate goods with their source.

See publication Words and Phrases for other judicial constructions and definitions.

7. Trade Regulation ⇐387

Survey evidence in trademark case which was limited to universe of males between ages of 12 and 23 who had played basketball within previous year was not entitled to any substantial weight in determining whether red, white and blue basketball had acquired secondary meaning.

Alfred Musumeci, and Regan, Goldfarb, Powell & Quinn, New York City, for plaintiff; Francis J. Purcell, Martin Heller, Howard Breindel and Jan Atlas, New York City, of counsel.

Rogers, Hoge & Hills, New York City, for defendants; Mercer L. Stockell, James B. Swire, E. Carrington Boggan and Steven Naclerio, New York City, of counsel.

OPINION

DUFFY, District Judge.

This is a motion for a preliminary injunction to prevent the alleged infringement of an alleged trademark owned by the plaintiff. Various claims of unfair competition are also charged.

A five day hearing was held on this motion and included the reception of many depositions which the Court read *in camera*. A number of physical exhibits were also received in evidence, although the Court refused to admit the ten large crates of physical exhibits, consisting of various items of multicolored sports equipment, offered by defendants. Instead, descriptions of rep-

resentative samples of the proffered exhibits were dictated into the record.

Plaintiff has also moved to consolidate the hearing on the preliminary injunction with the trial of the permanent injunction, proposing that the question of damages, if any, be decided in a separate hearing held subsequent to this decision.

Defendants have vigorously opposed both motions.

The plaintiff, American Basketball Association (hereinafter referred to as "ABA") is a professional basketball league formed in 1967, and is in competition with the much older National Basketball Association. The defendant AMF Voit, Inc. is a manufacturer of various sporting goods, including basketballs, and is a wholly owned subsidiary of the other defendant, A.M.F., Incorporated (both defendants are hereinafter referred to as "A.M.F.").

When the ABA was formed, its first Commissioner, George Mikan, determined that the new league would have to have a "gimmick" to differentiate it from the older established National Basketball Association. Among other things, it was decided that a multicolored basketball could be one such "gimmick".

Until this time, all official basketball games, whether professional or scholastic, had been played with a leather ball consisting of eight tan leather panels affixed to an underlying bladder in a particular sequence. The ABA did not change the size of the ball or the shape of the leather panels but proposed that the uniformly tan panels be changed by dyeing the leather to produce a red-white-blue-white-red-white-blue-white combination. It was thought that this would be more appealing to women and more attractive on color television.

Various manufacturers were contacted and the successful bidder, Rawlings Sporting Goods Company ("Rawlings") produced a red, white and blue ball and also a yellow ball for inspection by Mr. Mikan, the Commissioner of the ABA and various other league officials. They took these balls to the local Minneapolis TV station. (The headquarters of the league was located in Minneapolis, which was also Mr. Mikan's hometown.) The balls were tested on closed circuit TV, particularly to see if the red, white and blue ball would produce "trailers" on color TV receivers. Apparently, no difficulty was found with the use of the red, white and blue ball on color TV.

It was then finally decided that the league would adopt the red, white and blue basketball and require its use in all official league games. In all of its publicity thereafter and in all of the publicity for the various league teams, the red, white and blue basketball was prominently displayed. Indeed, even now, all nationally televised ABA games are introduced with a short film (or more properly a video-tape), which pictures the red, white and blue basketball.

This Court finds that the real impetus behind the use by the ABA of the red, white and blue basketball came from George Mikan, the first Commissioner of the ABA. In his deposition, Mr. Mikan said that he had a recollection of seeing multicolored basketballs used for practice on pre-game warmups, prior to the advent of the ABA. He denied, however, ever seeing a red, white and blue basketball as such and specifically denied ever seeing a red, white and blue basketball manufactured for the Hutch Athletic Goods Company and supposedly distributed for sale in the Minneapolis area prior to the advent of the ABA.[1]

As indicated above, the Rawlings Company was commissioned to manufacture the ball actually used in all league

1. It is unnecessary for this Court to find whether, in fact, the Hutch Athletic Goods Company had had red, white and blue basketballs manufactured for it prior to 1967, much less whether such balls were distributed or offered for distribution in the Minneapolis area.

games. Each such ball contains the ABA logo along with the Rawlings logo.

As a "promotional stunt", however, the various teams of the ABA, at the inception of the league, had "ball nights" wherein a patron who attended the league game on a particular night would receive a promotional red, white and blue basketball as a souvenir.[2] These promotional balls were originally supplied by Wilson Sporting Goods Company ("Wilson"). These balls were purchased by the teams through the league office and were apparently made of inferior "rubber" or vinyl. These promotional balls also showed the ABA logo along with the Wilson logo. The Wilson promotional basketballs apparently were not suited to playground use and would bulge out of shape. After a couple of years, the ABA dropped this source of supply for promotional balls.

During this period, the league teams apparently were experiencing some difficulty in obtaining these balls. For example, the New York Nets, an ABA team, had manufactured for promotional purposes a red, white and blue ball identical to the league's game ball, which bore only the logo of the New York Nets.

In any event, it is clear that after the advent of the ABA, many companies began selling red, white and blue basketballs without the ABA logo but carrying the logo of the manufacturer and/or distributor. These companies included Hutch Athletic Goods Company, Regent Sporting Goods Company, Pennsylvania Rubber Company, MacGregor Co. and Spalding Co.

When the ABA originally used its red, white and blue ball, Commissioner George Mikan asked a patent lawyer to take steps to assert a design patent right over the coloration. Apparently nothing came of this approach. The ABA thereupon applied for a copyright for the coloration of the basketball. This application was rejected.

On March 15, 1971, an application for the trademark in question in this action was filed with the Patent Office by the plaintiff. Almost a year later, on February 22, 1972, the trademark was published in the Official Gazette of the United States Patent Office. Subsequently, four separate oppositions to registration of the trademark were filed, including one by the defendants, AMF.[3]

On its part, AMF points out that it felt competitive forces and pressures from its sales force which led to its manufacturing and marketing and then distributing red, white and blue basketballs starting in about November 1970. This ball was catalogued by AMF as "WBR" ball. In the initial Research and Development Order and in the initial Production Order, the officials of AMF referred specifically to a "Red, White and Blue ABA Ball" and to the production of an "ABA Basketball". It should be noted that the red and the blue of the WBR ball are more vibrant than those used in the official ABA basketball.

Initially, in advertising the introduction of the WBR basketball, AMF referred to its basketball as an "ABA Type Basketball". It is undisputed that many other manufacturers and retail outlets of red, white and blue basketballs have described them in the media as "ABA Style" basketballs and in fact do so to the present time. However, AMF stopped such references some time ago. Indeed, at least once, when the defendants' WBR basketball was so referred to by an AMF customer, the defendant no-

2. There is also some indication that some of the league teams sold these balls to their fans.

3. This Court, in setting the date for the hearing of this motion, directed the parties to ask the Board of Trademark Appeals of the United States Patent Office to expedite the hearings and resolution of these objections. This Court specifically sought the expertise of that Board on the questions involved in this case. It was reported to the Court that the Board declined to do so since it would "take a year" before a determination could be made by that Board.

tified the retailer that it did not produce an "official" ABA basketball. Such references at the retail level were stopped thereafter.

Recognizing a trend toward multicolored sports goods, AMF has started production of other types of multicolored balls, e. g., green, gold and white basketballs. These other multicolored basketballs are displayed with the red, white and blue basketball, both in the defendants' catalogues and in retail dealer displays.

THE PLAINTIFF'S CONTENTIONS

[1] The plaintiff claims that the red, white and blue panels and the arrangement thereof on its official game ball constitute a valid trademark. A copy of the exhibit showing this coloration, which was attached to the plaintiff's application for a trademark filed with the United States Patent Office, is set forth in footnote.[4] This trademark is claimed both on the grounds of a valid statutory trademark and also on the basis of a common law trademark.

[2] The plaintiff further contends that even if at the outset the coloration of its official basketball was not such as to be a trademark, it has achieved that status by a "secondary meaning" or the subsequent association by the public of the coloration of the ball with the league. Cf. Continental Motors Corp. v. Continental Aviation Corp., 375 F.2d 857 (5th Cir. 1967).

The ABA charges, first, that the defendants infringed on its claimed trademark by selling basketballs of a coloration similar to that of the claimed trademark; second, that they have engaged in unfair competition by selling such basketballs of inferior quality; and last, that they diluted the plaintiff's trademark by the display in retail outlets and media advertising of the red, white and blue basketballs with other multicolored basketballs.

Of course, the plaintiff asserts a claim of irreparable harm and all the other elements required for a preliminary injunction.

THE DEFENDANTS' CONTENTIONS

The defendants contend that the plaintiff's claimed trademark is invalid. In addition, the defendants' claim that there was a prior use; that the pattern of red, white and blue cannot be a trademark; that such a pattern is functional and merely ornamental and decorative; that no secondary meaning has been established; that the plaintiff could not be recognized by the public as a trade source; that, if plaintiff had a right to a trademark, it was destroyed by plaintiff's actions; and that defendants were entitled to refer to their basketballs as "ABA type".

THE COURT'S CONCLUSIONS[5]

[3] The basic issue of this controversy is whether the claimed trademark of the ABA is valid. I find that it does not meet the minimum standards for a valid trademark under the relevant statute or at common law.

Congress has defined a trademark as: ". . . any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those of others." Trade-Mark Act of 1946, § 45, 60 Stat. 443, 15 U.S.C. § 1127.[6]

Although this section does not require that a trademark be actually distinctive,

4. See Exhibit appended.

5. This section should be considered as only part of the Court's Findings of Fact and Conclusions of Law as required by F.R. Civ.P. Rule 52(a). This opinion should be viewed as a whole, with the Findings of Fact set forth in the earlier parts of this opinion to be "Findings of Fact" as required by the Rule.

6. The statute also defines "service mark" as "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others." Lanham Act, § 45, 60 Stat. 443, 15 U.S.C. § 1127. As used elsewhere in the Statute and as used in this opinion, the word "trademark" includes the words "service mark".

as opposed to being "used by a manufacturer . . . to . . . distinguish" his goods, Section 2 of the Act governing registration of trademarks does include such a requirement. Trade-Mark Act of 1946, § 2, 60 Stat. 428, 15 U.S.C. § 1052; Application of McIlhenny Company, 278 F.2d 953, 47 C.C.P.A. 985 (1960). Thus, in order for plaintiff's claimed trademark to be entitled to statutory protection, it must, in fact, be distinctive.

Cutting through the claims and contentions of the parties, it is this Court's finding that the mere coloration of the various panels of the ordinary basketball is not sufficiently distinctive to be the subject of a statutory trademark. The basketball used by the plaintiff is of the same configuration as an ordinary basketball except that the colors of the particular panels are different. I find that the colors are merely a decoration or embellishment. Norwich Pharmacal Company v. Sterling Drug, Inc., 271 F.2d 569 (2d Cir. 1959); Campbell Soup Co. v. Armour & Co., 175 F.2d 795 (3d Cir. 1949).

The use of colors on sports equipment started some time ago. An early example was the adornment of white tennis socks with a red, white and blue band. This was held *not* to be a protected design under either the law of trademark or otherwise. *Cf.* In re David Crystal, Inc., 296 F.2d 771, 49 C.C.P.A. 775 (1961).

The controlling law as to the use of colors as a trademark is found in the opinion of Judge Duffy in Life Savers Corporation v. The Curtiss Candy Company, 182 F.2d 4 (7th Cir. 1950). In that case, the plaintiff had sued to stop the defendant from using a multicolored package to denote its fruit flavored drops, which package closely resembled in coloration a package used by plaintiff to sell its fruit flavored candies. Each of the packages contained a logo of the manufacturers. Indeed, the Court held:

"The dominant feature of plaintiff's trademark is the words, 'Life Savers', appearing three times in bold white letters extending practically the length of its label. It would indeed seem unlikely for any purchaser buying a package of 'Life Savers' to avoid knowledge of the origin of the package of Life Savers. The same is likewise true as to any of defendant's packages of hard candy." 182 F.2d, at pp. 7–8.

Thus, where colors are used in combination with a logo, it is the logo, not the colors, which serves to identify the source of the goods.

On all of the basketballs produced at the hearing herein, there was a logo of the manufacturer of the basketball alone save for those which were authorized by the ABA (or the National Basketball Association) which also contained the logo of the professional league. These logos were the truly distinctive features of the various basketballs, not the colors of the panels.

[4] While conceding that color used merely as decoration may not be the subject of a valid trademark, plaintiff claims that its coloration of the basketball forms a distinctive design. Distinctive designs, whether colored or not, may be protected as trademarks. In re Swift & Co., 223 F.2d 950, 42 C.C.P.A. 1048 (1955); The Barbasol Co. v. Jacobs, 160 F.2d 336 (7th Cir. 1947). Far from adopting a distinctive design, however, plaintiff has merely added coloring to the panels of a standard basketball. This change in coloration of the tan panels of previous basketballs was merely decorative or ornamental. Ex parte Hall, 73 U.S.P.Q. 8 (P.T.C.1947); Radio Corp. of America v. Decca Records, Inc., 51 F.Supp. 493 (S.D.N.Y.1943). Therefore, I cannot find that the dyeing of the standard panels in red, white and blue constituted a valid trademark at its

inception. In re Burgess Battery Co., 112 F.2d 820, 27 C.C.P.A. 1297 (1940).

[5] We come then to the question of "secondary meaning", which is an entirely different problem for this Court to resolve. A design which lacks sufficient distinction to qualify as a valid trademark may nonetheless become a good mark if it acquires "secondary meaning". Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 59 S.Ct. 191, 83 L.Ed. 195 (1938).

Our appellate courts have defined "secondary meaning" as requiring a finding "that the design is a mark of distinction identifying the source of the article and that purchasers are moved to buy it because of its source." Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694 (2d Cir. 1961); see also Hygienic Specialities Co. v. H. G. Salzman, Inc., 302 F.2d 614, 620 (2d Cir. 1962).

[6] Basically, "secondary meaning" within the trademark laws is equivalent to an association between the "trademark" and the supposed source of the goods such that an ordinary man would immediately associate the goods with their source. Continental Motors Corp. v. Continental Aviation Corp., 375 F.2d 857 (5th Cir. 1967).

Here the basic question is whether the red, white and blue basketball is so identified with the plaintiff that an ordinary man would find that any red, white and blue basketball was the symbol or trademark of the ABA and that the ABA was its source.

[7] To support its claim of trademark due to this secondary meaning, the plaintiff requested the Roper organization to conduct a pilot survey of the market for multicolored basketballs. At the hearing, the results of this survey were received in evidence over the objection of the defendants. This pilot survey, although admittedly incomplete, showed that at best, only 61 per cent of the persons surveyed associated the red, white and blue basketball with the ABA. When considered with the control group which showed a 18 per cent "guess" factor, it would appear that approximately 42 per cent of the people interviewed knowingly associated the ABA with the red, white and blue basketball. This survey was further deficient in that: it was set up so that no logo showed on the red, white and blue basketball; it was limited to a universe of males between the ages of 12 and 23; and it was limited to those who had played basketball within the last year. No attempt was made to contact those who would actually purchase basketballs. For this reason alone, I find the "universe" to be too narrow to allow the survey to be given any substantial weight. Sears, Roebuck and Co. v. Allstate Driving School, Inc., 301 F.Supp. 4 (E.D.N.Y.1969); General Motors Corp. v. Cadillac Marine & Boat Co., 226 F.Supp. 716 (W.D.Mich.1964).

More difficult on the question of secondary meaning is the use by the defendants of the terms "ABA ball" or "ABA type" basketball in the intercompany memorandum and in the advertising of some of its retailers. This is particularly disturbing since the defendants' ball bears the word "Official". To the trade the designation "official" means of an official weight and size.[7] Since it is known to the trade what the word means, I believe that no unfair competition with the plaintiff occurred. Furthermore, at the time that AMF used these terms in its interoffice memoranda and its advertising, there were a large number of others manufacturing red, white and blue basketballs, each labelled with the logo of the manufacturer. There could be no confusion as to the source of the basketballs. I find that the use of the terms was merely a shorthand way of saying "similar to"

7. I am sending this opinion to the Federal Trade Commission. It appears to me that some might be misled by the simple designation "official". It would appear to me that such a designation, to be completely accurate, should be more fully spelled out to reflect that it refers to "Official Size and Weight".

the red, white and blue basketballs used by the ABA.

Indeed, to have a valid trademark flowing from a secondary meaning, the ordinary man would have to identify the mark with the "source" of the goods. Vandenburg, Trademark Law and Procedure, Second Ed.1968, at p. 3. It has been said of the law of trademarks that:

> "Its fundamental purpose is to prevent a person from passing off his goods as the goods of another. The critical question is whether customers are, or may be, misled." Jean Patou v. Jacqueline Cochran, Inc., 201 F. Supp. 861, 863 (S.D.N.Y.1962), aff'd 312 F.2d 125 (2d Cir. 1963).

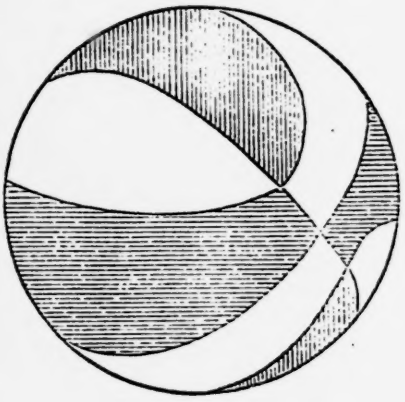
At no time did the ABA hold itself out to be the source of red, white and blue basketballs. Nor did the plaintiff check the quality of the products of its "licensees" so as to properly control the "source" of the product over which it claims an exclusive trademark.

The ABA produced at the trial Daniel Reilly, who is president of the ABA Merchandising Division. This division was organized in 1972. Prior to this time there is no evidence that quality was mentioned by the plaintiff. Since the organization of the division, Mr. Reilly testified that he had checked on the coloration of the balls and bounced them a few times. It is clear that prior to this time, particularly at the league's outset, inferior basketballs supplied by Wilson Sporting Goods Company were given or sold to the public. This is far from "quality control" over the trademarked goods.

Accordingly, I find that the affixation of red, white and blue panels to an ordinary basketball is not sufficient to create a trademark, and that no "secondary meaning" entitled to the protection of a trademark has been established.

For the reasons cited above, this Court grants the motion by plaintiff to consolidate the hearing of the motion for a preliminary injunction with the trial of the case for a permanent injunction pursuant to F.R.Civ.P. Rule 65(a)(2) and adjudges that the plaintiff's demand for a preliminary and permanent injunction must be denied.

Settle order on notice.



The drawing is lined for color. Unlined portions are white.

APPENDIX C
Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of January, one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. MULLIGAN,
Circuit Judges.

Docket No. 73-1191

THE AMERICAN BASKETBALL ASSOCIATION,

Plaintiff-Appellant,

v.

AMF VOIT, INC. and AMF INCORPORATED,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

APPENDIX D

Statute Involved

§ 1052. Trade-marks registrable on principal register; concurrent registration

No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.

(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.

(d) Consists of or comprises a mark which so resembles a mark registered in the Patent Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion, or to cause mistake, or to deceive: *Provided*, That when the Commissioner determines that confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks under conditions and limitations as to the mode or place of use of the marks or the goods in connection with which such marks are used, concurrent registrations may be issued to such persons when they have become entitled to use such marks as a result of their concurrent lawful use in commerce prior to (i) the earliest of the filing dates of the applications pending or of any registration issued under this chapter; or (ii) July 5, 1947, in the case of registrations previously issued under the Act of March 3, 1881, or February 20, 1905, and continuing in full force and effect on that date; or (iii) July 5, 1947, in the case of applications filed under the Act of February 20, 1905, and registered after July 5, 1947. Concurrent registrations may also be issued by the Commissioner when a court of competent jurisdiction has finally determined that more than one person is entitled to use the same or similar marks in commerce. In issuing concurrent registrations, the Commissioner shall prescribe conditions and limitations as to the mode or place of use of the mark or the goods in connection with which such mark is registered to the respective persons.

(e) Consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them, or (2) when applied to the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, except as indications of regional origin may be registrable under section 1054 of this title, or (3) is primarily merely a surname.

(f) Except as expressly excluded in paragraphs (a)–(d) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Commissioner may accept as prima facie evidence that the mark has become distinctive, as applied to the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years next preceding the date of the filing of the application for its registration. July 5, 1946, c. 540, Title I, § 2, 60 Stat. 428; Oct. 9, 1962, Pub.L. 87-772, § 2, 76 Stat. 769.

SUPREME COURT, U. S.
73 - 1467

FILED
APR 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1467

THE AMERICAN BASKETBALL ASSOCIATION,
Petitioner,

against

AMF VOIT, INC. and AMF INCORPORATED,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE AMERICAN BASKETBALL ASSOCIATION,
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AMF VOIT, INC. and AMF INCORPORATED,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition seeks a writ of certiorari to review determinations of issues arising under state common law relating to trademarks, over which the District Court had jurisdiction only by virtue of pendant jurisdiction. This Court should not grant certiorari to review such determinations, especially where they rest merely on determinations of factual issues.

Opinions Below

The opinion of the District Court was reported at 358 F. Supp. 981, 177 U.S.P.Q. 442 (S.D.N.Y. 1973) and the affirmance by the Court of Appeals without opinion was reported at 487 F.2d 1393, 180 U.S.P.Q. 290 (2nd Cir. 1973). Denial of rehearing by the Court of Appeals was also reported at 180 U.S.P.Q. 290 (2nd Cir. 1974).

Respondents' Statement of the Case

As shown by the decision of the District Court, plaintiff American Basketball Association ("ABA") was formed in 1967 and, as a "gimmick", colored the standard eight panels of the common basketball with alternating colors of red, white and blue. These balls bore the logo "ABA" in a prominent position.

Shortly after the ABA started use of the colored ball, "many companies began selling red, white and blue basketballs without the ABA logo but carrying the logo of the manufacturer and/or distributor. These companies included Hutch Athletic Goods Company, Regent Sporting Goods Company, Pennsylvania Rubber Company, MacGregor Co. and Spalding Co." In November, 1970, in response to sales by competitors, defendant AMF Voit, Inc. ("AMF") brought out its own multi-colored basketball bearing the AMF VOIT logo. (Appendix B, A-4).

The ABA waited from 1967 until March, 1971, before applying to register the coloration as a trademark for basketballs. (Appendix B, A-4). The mark was never registered and plaintiff instituted this action for common law trademark infringement, violation of 15 U.S.C. §1125(a), and unfair competition in July, 1972.

After trial, the District Court ruled for defendants on the grounds that plaintiff's alleged mark was not inherently distinctive; that plaintiff had failed to establish secondary meaning; and that no unfair competition had been committed. On appeal, the Court of Appeals affirmed without opinion and rehearing was denied.

Reasons for Denying the Writ

1. The Reasons Advanced by the Petition Relate Only to Issues Arising Under State Common Law.

Petitioner's statement of the case (page 3) acknowledges that jurisdiction of the District Court rests only on Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), and pendant jurisdiction. That section of the Act states:

> "Any person who shall affix, apply, or annex, or use in connection with any goods, or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words, or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

Thus, the only federal claim in this action is the count for false designation of origin or false description or representation. Yet petitioners, in seeking the issuance of the writ, do not request review of the denial of their claims under Section 43(a). Instead, they seek review only of issues of trademark infringement which, in this action, arise under state common law. Accordingly, petitioner seeks interpretation by this Court not of federal law but of state common law. *Pecheur Lozenge Co., Inc.* v. *National Candy Company, Inc.*, 315 U.S. 666 (1942).

Petitioner's recitation of Section 2 of the Lanham Act, 15 U.S.C. §1052, as the statute involved is in error. Since there is no registration in the United States Patent Office of the alleged mark sought to be protected, there is no District Court jurisdiction of the action as a federal claim for trademark infringement. 15 U.S.C. §1114(1). The District Court had no jurisdiction even to determine registrability of any trademark in absence of a prior determination by the Patent Office and review thereof pursuant to Section 21 of the Act, 15 U.S.C. §1071.

> "Congress has confided the registration of trademarks to the Patent Office of the United States. The Courts of the United States have no jurisdiction over registration proceedings except that appellate jurisdiction given them by the Trade-Mark Act." *Merrick* v. *Sharp & Dohme, Inc.* 185 F.2d 713, 717, 88 U.S.P.Q. 145, 149, (7th Cir. 1950); *cert. denied* 341 U.S. 954 (1951).

It is true that to the extent that this action was for false designation of origin or false representation under Section 43(a) of the Lanham Act, the District Court had jurisdiction of it as a "civil action arising under any Act of Congress relating to . . . trade-marks", 28 U.S.C. § 1338(a). In addition, the District Court could properly exercise pendant jurisdiction of the common law trademark infringement claim. 28 U.S.C. § 1338(b). Such pendant jurisdiction of the common law trademark claim does not, however, encompass claims to federal trademark registration or claims under the statutory trademark provisions of the Lanham Act.

In essence, the petition does not seek interpretation of any issues of federal law, but merely seeks review of state common law trademark issues. The decision of the District Court does not conflict with applicable state law

and thus there is no reason here for review on writ of certiorari as specified by Rule 19 of the Rules of this Court. The petition should be denied.

2. The Petition Seeks Review of Determinations of Fact Limited to this Case.

The reasons advanced by the petition, aside from the fact that they relate merely to state common law, do not justify granting a writ of certiorari. The Court of Appeals for the Second Circuit affirmed the District Court's decision without opinion, 487 F.2d 1393, 180 U.S. P.Q. 290 (2nd Cir. 1973). It dispensed with an opinion apparently pursuant to its new rule (§ 0.23) of October 31, 1973 which provides in part:

> ". . . in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order."

As the Court of Appeals did not see sufficient question on the appeal even to justify a written opinion, we submit that the matter does not justify the granting of a writ of certiorari by this Court.

In any event, the questions presented by the petition (page 2) are not of general significance. The first two questions involve, basically, whether or not the plaintiff's alleged trademark was inherently distinctive and, if not, whether the alleged trademark had acquired such secondary meaning as to render it distinctive. These are simply questions of fact which were determined adversely to the petitioner by the District Court and concerning which the Court of Appeals saw no neeed to find the determinations "clearly erroneous". It affirmed unanimously and, as mentioned, without even an opinion.

The District Court stated in finding that the coloration of the various panels of the ordinary basketball is not inherently distinctive:

> "The basketball used by the plaintiff is of the same configuration as an ordinary basketball except that the colors of the particular panels are different. I find that the colors are merely a decoration or embellishment." (Appendix B; A-6)

Such finding seems hardly a matter for reconsideration by this Court and seems self-evident on its face. The Court simply found as a fact that the application of red, white and blue colors—the national colors—to the ordinary panels of a basketball is not by its nature so arbitrary and distinctive that it would be automatically recognized by the public as a trademark for basketballs. Any finding to the contrary would mean that simply by adoption and commencement of use the petitioner acquired a perpetual monopoly in the sale of basketballs so colored.

Having found that the alleged mark was not *inherently* arbitrary and distinctive, the District Court then considered whether plaintiff had established a secondary meaning in the alleged mark. This too was a question of fact which was decided adversely to petitioner. Petitioner simply failed to prove before the District Court any distinctiveness of its alleged trademark as a result of secondary meaning.

These two findings of fact justify the decision of the District Court and there is no need to go beyond these findings or to reexamine them. Similarly, the third and fourth questions presented by the petition involve questions of fact as to whether the ABA abandoned its mark and whether any unfair competition was committed. Such factual determinations are not of such significance as to justify the granting of a writ of certiorari to examine their correctness, for they relate only to the present case.

CONCLUSION

The petition does not raise questions of federal law and involves only issues of fact, limited to the case at bar. The Court of Appeals implicitly found that "no jurisprudential purpose would be served by a written opinion" and summarily affirmed, without opinion.

The petition should be denied.

Respectfully submitted,

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April 19, 1974